

(3) The issuer of such interest, participation or security shall have reasonable grounds to believe and, after making reasonable inquiry, shall believe immediately prior to any issuance that:

(i) The employer is a law firm, accounting firm, investment banking firm, pension consulting firm or investment advisory firm that is engaged in furnishing services of a type that involve such knowledge and experience in financial and business matters that the employer is able to represent adequately its interests and those of its employees; or

(ii) In connection with the plan, the employer prior to adopting the plan obtains the advice of a person or entity that (A) is not a financial institution providing any funding vehicle for the plan, and is neither an affiliated person as defined in section 2(a)(3) of the Investment Company Act of 1940 of, nor a person who has a material business relationship with, a financial institution providing a funding vehicle for the plan; and (B) is, by virtue of knowledge and experience in financial and business matters, able to represent adequately the interests of the employer and its employees.

(b) Any interest or participation issued to a participant in either a pension or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954 or an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of such Code, and which covers employees, some or all of whom are employees within the meaning of section 401(c)(1) of such Code, shall be exempt from the provisions of section 5 of the Act.

[46 FR 58291, Dec. 1, 1981]

§ 230.190 Registration of underlying securities in asset-backed securities transactions.

(a) In an offering of asset-backed securities where the asset pool includes securities of another issuer ("underlying securities"), unless the underlying securities are themselves exempt from registration under section 3 of the Act (15 U.S.C. 77c), the offering of the relevant underlying securities itself

must be registered as a primary offering of such securities in accordance with paragraph (b) of this section unless all of the following are true. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(1) Neither the issuer of the underlying securities nor any of its affiliates has a direct or indirect agreement, arrangement, relationship or understanding, written or otherwise, relating to the underlying securities and the asset-backed securities transaction;

(2) Neither the issuer of the underlying securities nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the asset-backed securities transaction;

(3) If the underlying securities are restricted securities, as defined in § 230.144(a)(3), § 230.144 must be available for the sale of the securities, provided however, that notwithstanding any other provision of § 230.144, § 230.144 shall only be so available if at least two years have elapsed since the later of the date the securities were acquired from the issuer of the underlying securities or from an affiliate of the issuer of the underlying securities; and

(4) The depositor would be free to publicly resell the underlying securities without registration under the Act. For example, the offering of the asset-backed security does not constitute part of a distribution of the underlying securities. An offering of asset-backed securities with an asset pool containing underlying securities that at the time of the purchase for the asset pool are part of a subscription or unsold allotment would be a distribution of the underlying securities. For purposes of this section, in an offering of asset-backed securities involving a sponsor, depositor or underwriter that was an underwriter or an affiliate of an underwriter in a registered offering of the underlying securities, the distribution of the asset-backed securities will not constitute part of a distribution of the underlying securities if the underlying securities were purchased at arm's length in the secondary market at least three months after the last sale of any unsold allotment or subscription by the affiliated underwriter

that participated in the registered offering of the underlying securities.

(b) If all of the conditions in paragraph (a) of this section are not met, the offering of the relevant underlying securities itself must be registered as a primary offering of such securities in accordance with the following:

(1) If the offering of asset-backed securities is registered on Form S-3 (§239.13 of this chapter), the offering of the underlying securities itself must be eligible to be registered under Form S-3 or F-3 (§239.33 of this chapter) as a primary offering of such securities;

(2) The plan of distribution in the registration statement for the offering of the underlying securities contemplates this type of distribution at the time of the commencement of the offering of the asset-backed securities;

(3) The prospectus for the asset-backed securities offering describes the plan of distribution for both the underlying securities and the asset-backed securities;

(4) The prospectus relating to the offering of the underlying securities is delivered simultaneously with the delivery of the prospectus relating to the offering of the asset-backed securities, and the prospectus for the asset-backed securities includes disclosure that the prospectus for the offering of the underlying securities will be delivered along with, or is combined with, the prospectus for the offering of the asset-backed securities;

(5) The prospectus for the asset-backed securities offering identifies the issuing entity, depositor, sponsor and each underwriter for the offering of the asset-backed securities as an underwriter for the offering of the underlying securities;

(6) Neither prospectus disclaims or limits responsibility by the issuing entity, sponsor, depositor, trustee or any underwriter for information regarding the underlying securities; and

(7) If the offering of the asset-backed securities and the underlying securities is not made on a firm commitment basis, the issuing entity or the underwriters for the offering of the asset-backed securities must distribute a preliminary prospectus for both the underlying securities offering and the asset-backed securities offering that

identifies the issuer of the underlying securities and the expected amount of the issuer's underlying securities that is to be included in the asset pool to any person who is expected to receive a confirmation of sale of the asset-backed securities at least 48 hours prior to sending such confirmation.

(c) Notwithstanding paragraphs (a) and (b) of this section, if the asset pool for the asset-backed securities includes a pool asset representing an interest in or the right to the payments or cash flows of another asset pool, then that pool asset is not considered an "underlying security" for purposes of this section (although its distribution in connection with the asset-backed securities transaction may need to be separately registered) if the following conditions are met:

(1) Both the issuing entity for the asset-backed securities and the entity issuing the pool asset were established under the direction of the same sponsor and depositor;

(2) The pool asset is created solely to satisfy legal requirements or otherwise facilitate the structuring of the asset-backed securities transaction;

(3) The pool asset is not part of a scheme to avoid registration or the requirements of this section; and

(4) The pool asset is held by the issuing entity and is a part of the asset pool for the asset-backed securities.

[70 FR 1615, Jan. 7, 2005, as amended at 72 FR 71571, Dec. 17, 2007]

§ 230.191 Definition of "issuer" in section 2(a)(4) of the Act in relation to asset-backed securities.

The following applies with respect to asset-backed securities under the Act. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§229.1101 of this chapter).

(a) The depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the "issuer" for purposes of the asset-backed securities of that issuing entity.

(b) The person acting in the capacity as the depositor specified in paragraph (a) of this section is a different "issuer" from that same person acting